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No. 83-36

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THOMAS P. VANN and
JAMES E. MELHORN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF AMICUS CURIAE OF THE COMMITTEE OF CRIMINAL ANTITRUST DEFENSE COUNSEL IN SUPPORT OF PETITIONERS

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INTRODUCTION

The Committee of Criminal Antitrust Defense Counsel ("Committee") files this Brief as *amicus curiae*, with the consent of all parties, in support of the Petition for a Writ of Certiorari filed by Thomas P. Vann and James E. Melhorn herein.

The Committee's support as *amicus* is limited to the second question presented in the Petition.[1] Petitioners there urge this Court to review the Sixth Circuit's ruling in this fact situation: the indictment charged defendants and others with participating in a *per se* unlawful conspiracy to rig the bids of *two* identified contracts. The Bill of Particulars related only to those two contracts. Following several days of trial, and without prior notice, the prosecution introduced testimony of defendants' alleged participation in *six* other uncharged bid rigging agreements. Both the District Court and the Sixth Circuit interpreted Federal Rule of Evidence 404(b)[2] ("Rule 404(b)") as permitting admission of such testimony on the issue of the defendants' "intent" — the Sixth Circuit on intent to agree and the District Court on intent to effectuate the objective of the conspiracy.

INTEREST OF THE AMICUS CURIAE

The Committee consists of lawyers from 78 law firms that have represented, now represent, and expect in the future to represent defendants in *per se* Sherman Act prosecutions. The issues presented by this case fundamentally affect the rights of Committee members' clients to a fair determination of their guilt or innocence.

The Committee's particular concern is that, under the Sixth Circuit's ruling, entry of a not guilty plea to the charged crime permits the prosecution, without prior notice, to introduce testimony of uncharged crimes at trial. The Sixth Circuit

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[1] The Committee herein takes no position on the other three questions presented for review by Petitioners

[2] 28 U.S.C. Federal Rules of Evidence 404(b): "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

held that intent to agree is a separate issue from the act of agreement in a *per se* Sherman Act case, that denial of the act of agreement puts such intent in issue, and that testimony of uncharged crimes is admissible on that issue.

Under that ruling, it is impossible for a defendant to prepare a response to a very damaging attack. The uncertainty created by the ruling affects both the outcome of the trial and the defendant's decision whether to force the prosecution to prove his guilt to the charged crime in the first place.

SUMMARY OF ARGUMENT

This Court should take jurisdiction of this case for the following reasons:

(a) To settle important questions of Federal law, specifically the proper relation of Rule 404(b) to the issue of "intent" in a *per se* Sherman Act prosecution, and the standards to be applied in exercising discretion under Rule 404 (b); and

(b) To resolve a conflict between the Courts of Appeals for the Sixth and other Circuits on whether, in a *per se* Sherman Act prosecution, intent to agree is an issue on which testimony of uncharged bad acts is admissible.

Since the Federal Rules of Evidence became effective in 1975, neither Rule 404(b) nor any of the other evidence rules has explicitly presented an issue for decision by this Court. In *Marshall* v. *Lonberger*, 51 U.S.L.W. 4113 (February 22, 1983), this Court recognized the confusion in the common law of admission of other crimes, wrongs or acts. Lower courts have considered issues under Rule 404(b) in over 800 cases: the rule is the most heavily litigated of all the evidence rules, and there is doubt and uncertainty concerning its meaning and application.

In the five years since this Court's last decision in a criminal antitrust case, *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978), over 300 criminal cases alleging *per se* Sherman Act violations by more than 900 defendants have been filed; 52 in the first six months of 1983 alone. In *Gypsum*, while this Court discussed at length the issue of "intent to effectuate objective" of a conspiracy, it mentioned but did not discuss a second type of intent: "basic intent to agree." The Sixth Circuit held in this case that testimony of uncharged bad acts was admissible under Rule 404(b) to show this basic level of intent. The District Court had expressly concluded to the contrary.

The Committee agrees with Petitioners that the Sixth Circuit misinterpreted and misapplied Rule 404(b) in this *per se* bid rigging case and virtually sanctions trial by propensity. That Court's holding makes the trial of a *per se* case uncertain and unpredictable, and directly affects both the ability of Committee members' clients to defend themselves effectively and the advice that Committee members give their clients on whether to stand trial in the first place.

The issue raised by Question 2 of the Petition affects a large number of pending and future *per se* Sherman Act prosecutions, as well as a broad range of other antitrust and non-antitrust cases in which Rule 404(b) is involved. This Court should take jurisdiction to rule on the relationship between Rule 404(b) and the issue of "intent" in a *per se* case, to establish standards for the exercise of discretion under that rule, and to resolve the conflict between the courts of appeals.

REASONS FOR GRANTING THE WRIT

I. This Court Should Take Jurisdiction to Settle Important Questions of Federal Law

A. This Court Should Establish Standards for the Exercise of Discretion under Rule 404(b).

Rule 404(b) is the most heavily litigated of all the evidence rules: as of July 30, 1983, the rule had been cited in 863 district court and court of appeals reported decisions.[3] The rule plays – and will continue to play – an important and often controlling role in a great many other decisions in a broad range of cases where motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident are involved.[4] While the rule establishes a flat prohibition against propensity evidence in the first sentence, it authorizes the exercise of very broad discretion with no substantive guidance whatever in the second.

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[3] 22Wright & Graham, *Federal Practice & Procedure* § 5239 at 427-428 (1978); 2 Weinstein, Evidence ¶ 404[08] at 404-47 (1982). The 863 case figure is based upon a Lexis study conducted on August 4, 1983.

[4] Motive, *Compare, United States* v. *Gorel*, 622 F.2d 100 (5th Cir.), *cert. denied*, 445 U.S. 943 (1979) *to United States* v. *Potter*, 616 F.2d 384 (9th Cir.), *cert. denied* 449 U.S. 832 (1979); Opportunity, *Compare United States* v. *DeJohn*, 638 F.2d 1048 (7th Cir. 1981) *to United States* v. *Green*, 648 F.2d 587 (9th Cir. 1981); Preparation, *See United States* v. *Gamble*, 541 F.2d 873 (10th Cir. 1976); Plan, *See United States* v. *Dothard*, 666 F.2d 498 (11th Cir. 1982); Knowledge, *Compare United States* v. *Miroff*, 606 F.2d 777 (7th Cir. 1979) *to United States* v. *DeFillipo*, 590 F.2d 1228 (2nd Cir.), *cert. denied*, 442 U.S. 920 (1979); Identity, *Compare* majority dissent, and concurring opinions in *United States* v. *Woods*, 613 F.2d 629 (6th Cir.) *cert. denied*, 446 U.S. 920 (1980); Absence of Mistake or Accident, *Compare United States* v. *Manafzadeh*, 592 F.2d 81 (2nd Cir. 1979) *to United States* v. *Cooper*, 577 F.2d 1079 (6th Cir.), *cert. denied*, 439 U.S. 868 (1978). The cases are in conflict principally over whether evidence is admissible under the exceptions regardless of the extent to which the defense first disputes the issue.

The result of this lack of guidance has been confusion and conflict. As stated at page 24 of the Petition:

> So widespread is the abuse of Federal Rule of Evidence 404(b) that the number of criminal defendants being effectively tried as recidivists is unknowable: 'There is no question of evidence more frequently litigated in the appellate courts than the admission of evidence of other crimes, wrongs, or acts.' As leading commentors recognize (and as shown above), 'despite the recurrence of the issue, the opinions are often poorly reasoned and provide little guidance to trial judges,' the decisions 'often cannot be reconciled'; the drafters of the rule 'chose to leave the law in its messy state'; and the rule itself 'does nothing to clarify the issues, and may in some respects have muddied the waters even more.' (footnotes omitted)

The Federal Rules of Evidence have only been cited by this Court in less than 40 cases since becoming effective in 1975, and neither Rule 404(b) nor any other evidence rule has presented an issue for decision by this Court.[5] Recently, however, in *Marshall* v. *Lonberger*, this Court recognized the general state of confusion in the common law of the admission of other crimes, wrongs or acts. In the majority opinion, Justice Rehnquist stated:

> Justice Stevens' dissent appears to rest on a view that the common law regarded the admission of prior convictions as grossly unfair and subject to some sort of blanket prohibition. In fact, the common law was far more ambivalent. . . . Alongside the general principle that prior convictions are inadmissible . . . the common law developed broad, vaguely defined exceptions – such

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[5] While certain cases, e.g., *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981) and *Trammel* v. *United States*, 445 U.S. 40 (1979), have dealt with the issue of privilege, Rule 501 expressly leaves development of the law of privilege to the courts and provides no substantive guidance.

> as proof of intent, identity, malice, motive and plan — whose application is left largely to the discretion of the trial judge. . . .[6]

In a dissent joined by Justices Blackmun, Brennan, and Marshall, Justice Stevens stated:

> The common law has long deemed it unfair to argue that because a person has committed a crime in the past, he is more likely to have committed a similar, more recent crime . . . The objection to such evidence is not that the proposed inference is illogical. The objection is rather that the inference is so attractive that it will overwhelm the fact finder and create an unwarranted presumption of guilt.[7]

The lower courts, prosecutors and defense counsel are in pressing need of guidance from this Court on the standards governing the exercise of discretion under Rule 404(b). This Court has provided such guidance in other contexts, having addressed the factors to be used in deciding whether a litigant is entitled to grand jury transcripts[8]; the standards by which the federal courts are to interpret questions of attorney-client privilege[9]; the standards by which the district courts are to determine whether a witness's claim of the privilege against self-incrimination is more than fanciful[10] and the

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[6] *Marshall* v. *Lonberger*, 51 U.S.L.W. 4113, 4118, n. 6 (Feb. 22, 1983). *See generally*, Reed, "The Development of the Propensity Rule in Federal Criminal Causes, 1840-1975", 51 U.Cin.L. Rev. 299 (1982).

[7] *Marshall* v. *Lonberger*, 51 U.S.L.W. at 4120, n. 1 (Stevens, J., dissenting). *See also*, *Michelson* v. *United States*, 335 U.S. 469, 475-476 (1948); *Boyd* v. *United States*, 142 U.S. 450 (1892).

[8] *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979). *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958).

[9] *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981).

[10] *Pillsbury Co.* v. *Conboy*, 103 S. Ct. 608 (1983).

rules to be followed in addressing the interplay between Federal and State Rules of Evidence and the Confrontation Clause.[11]

The issues raised by Rule 404(b) are immediate, continuing, important and often critical to guilt or innocence. Following full briefing and argument, this Court should set standards for the exercise of discretion by lower courts under that rule.

B. This Court Should Define The Proper Relation of Rule 404(b) And The Issue of "Intent" In A Per Se Sherman Act Prosecution.

(1) The Question Affects A Large Number of Cases

In the five years[12] since this Court last decided a criminal antitrust case,[13] over 900 individuals, associations and corporations have been prosecuted in 314 criminal actions charging *per se* violations of the Sherman Act.[14] The pace of enforcement has been increasing in the past few years: 57 *per se* Sherman Act prosecutions were filed in 1981, 90 in 1982, and 52 in the first six months of 1983.

Numerous *per se* cases are now in the pre-trial stage, and many more are likely to be filed. In all of these pending and future cases, agreement is the issue, and the evidence admissible on that issue is a critical element both in a defendant's decision to stand trial and in the outcome of the trial itself.

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[11] *Ohio* v. *Roberts*, 448 U.S. 56 (1980).

[12] July 1, 1978 to June 30, 1983.

[13] *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978).

[14] 1970-79 U.S. Antitrust Cases —— CCH Summaries ¶¶ 45,078, 45,079; 4 CCH Trade Reg. Rptr. ¶¶ 45,078, 45,079, 45,080, 45,081, 45,082, 45,083.

(2) The Sixth Circuit's Ruling Permits Admission of Bad Act Testimony in Every Case

The Sixth Circuit upheld admission of testimony of six uncharged, unrelated and allegedly unlawful bid rigging occurrences against Petitioners on the ground that the testimony bore on their "basic intent to agree" to the charged conspiracy.[15] The Circuit Court concluded that such intent was put in issue solely because Petitioners disputed the charge of having agreed: by raising a 'lack of agreement' defense and by developing, through cross-examination of the Government's witnesses, admissions that Petitioners either were merely present or were not present at various meetings with alleged co-conspirators and others.

In *per se* Sherman Act cases, proof of an overt act is unnecessary. The crime is the agreement and lack of agreement is virtually the only defense.[16] By permitting admission of bad act testimony whenever the accused denies having agreed, the Sixth Circuit permits admission of such testimony in every case: the denial of agreement is made by the not guilty plea.

The Sixth Circuit's holding penalizes an antitrust defendant in a *per se* case for pleading not guilty and standing trial, even when he does not dispute the intent issue and does not open up the issue of his good character. Such a holding

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[15] This case thus does not involve the admission of prior bad acts to show the specific intent element of certain cases under § 2 Sherman Act, 15 U.S.C. § 2, or to show the genesis of a common scheme or plan, or to lay a background for proof of the charged offense.

[16] *United States* v. *United States Gypsum Co.*, 600 F.2d 414, 417 (3rd Cir.) *cert. denied*, 444 U.S. 684 (1979). Accord, *United States* v. *Griffith*, 334 U.S. 100, 105 (1947); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-223, 252 (1940); *Nash* v. *United States*, 229 U.S. 373, 378 (1913); *United States* v. *Gillen*, 599 F.2d 541, 545-546 (3rd Cir.), *cert. denied*, 444 U.S. 866 (1979); R. Bork, *The Antitrust Paradox* 18 (1978).

permits the prosecution to elicit wholesale testimony of prior bad acts with no pretrial notice of its intent to do so.

(3) The Ruling Authorizes Trial By Propensity

The Sixth Circuit's ruling conflicts with the express prohibition contained in Rule 404(b):

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.

The testimony of six uncharged bid-rigging bad acts admitted in this case clearly bore on the propensity of defendants to commit the charged acts. Since the lack of agreement is virtually the sole defense, testimony relating to six other "agreements" could only tend to encourage the jury to find agreement in the seventh, and the Government conceded that that was an essential purpose of the evidence (Pet. App. 21a, 27a). Because the intent exception was not properly applied in this case, the admission of testimony of uncharged bad acts violated Rule 404(b)'s prohibition against propensity evidence.

(4) Evidence of Uncharged Bad Acts Should Not Be Admitted On The Issue Of Intent In Per Se Sherman Act Cases

This Court has identified two types of intent in Sherman Act cases. In *Gypsum*, relying on pp. 464-465 of W. LaFave and A. Scott's leading treatise,[17] this Court explained that:

> In a conspiracy, two different types of intent are generally required – *the basic intent to agree,* which is necessary to establish the existence of the conspiracy, *and the more traditional intent to effectuate the object*

[17] *LaFave & Scott,* Criminal Law (1972).

> *of the conspiracy. . . . Our discussion here focuses only on the second type of intent.* (emphasis added)[18]

As to "intent to achieve objective", each of the courts of appeals to consider the question has held that it is *not* an issue in a *per se* case.[19] This Court has declined to review every decision in which certiorari was sought. The Sixth Circuit in this case declined to follow the District Court's ruling that permitted admission of bad act testimony on the issue of "intent to effectuate objective." Unless and until this Court decides otherwise, "intent to effectuate objective" will not be an issue in *per se* Sherman Act cases, and an exception to Rule 404(b) for evidence of such intent cannot serve as a basis for admitting bad testimony.

Similarly it is submitted the basic intent to agree should not be a basis on which to introduce 404(b) evidence and in so doing the Sixth Circuit was in error. As Messrs. LaFave and Scott point out, intent to agree is virtually indistinguishable from the offense of agreement itself:

> Every conspiracy involves an agreement, so it must be established that the several parties intended to agree. But such an intent is 'without moral content' . . . . *The intent to agree is so intimately tied up with the*

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[18] *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 443 n.20)1978).

[19] *United States* v. *Kahan & Lessin Co.*, 695 F.2d 1122, 1125 (9th Cir. 1982); *United States* v. *Cargo Service Stations, Inc.*, 657 F.2d 676, 681-683 (5th Cir.), *reh. denied*, 664 F.2d 291 (1981), *cert. denied*, 455 U.S. 1017 (1982); *United States* v. *Koppers Co.*, 652 F.2d 290, 295-296 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States* v. *SIGMA*, 624 F.2d 461, 465 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 461-462 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *United States* v. *Gillen*, 599 F.2d 541, 544-546 (3rd Cir.,), *cert. denied*, 444 U.S. 866 (1979); *United States* v. *Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979).

> *agreement (the act part of the crime) that it is best dealt with in that context. Indeed, it may even be said that such intent is not really part of the mens rea of the conspiracy.*[20]

Moreover, intent to agree is necessarily proven by proof of the agreement itself.[21] In a *per se* antitrust case, the intent to agree is so inextricably intertwined with the act part of the crime that admitting bad acts to show this type of intent is the equivalent of admitting prior crimes to show propensity.[22]

The questions requiring ruling by this Court are whether basic intent to agree is a separate issue from the act of agreement; if so, the acts of defendant – e.g., not guilty plea, argument before or at trial, defense evidence on lack of intent – that permit the admission of bad act testimony on that issue; and the standards to be applied in exercising discretion in admitting such testimony.

Until these questions are resolved, trial of a *per se* case will be a game played with dice loaded in the prosecution's favor.

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[20] W. LaFave & A. Scott, *Criminal Law*, § 61 at 464 (1972, 4th Repr. 1978).

[21] *See* Petitioners' Petition at 21-22 and notes thereto; *United States* v. *Gillen*, 599 F.2d at 545 ("No inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy").

[22] The District Court held, for this reason, that the testimony was not admissible on the issue of "intent to agree." Pet. p. 5, Pet. App. 21a, 28a-29a.

II. The Sixth Circuit's Decision Conflicts With Decisions In Other Circuits

The Sixth Circuit's decision that bad acts are admissible to show intent in a *per se* antitrust case is squarely at odds with the Eighth Circuit's decision in *United States* v. *Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970). In that case, it was held that testimony of other conspiracies was inadmissible in a *per se* antitrust case because

> intent was not an issue in the case. The act of price rigging in interstate commerce was a *per se* violation of the Act and intent would be immaterial. (430 F.2d at 594 n.4).

The Sixth Circuit's decision also at least implicitly conflicts with recent antitrust decisions in the Seventh and Ninth Circuits. In *United States* v. *Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1108-1109 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979), attorneys for the Government asked a witness in a bid rigging case about other conspiratorial activity ostensibly to elicit evidence about the accused's knowledge and intent as to the offense charged. The District Court struck the question as prejudicial and the Seventh Circuit agreed that this was sufficient to avoid prejudice. In *United States* v. *Kahan & Lessin Co.*, 695 F.2d 1122, 1124 (9th Cir. 1982), the Government inquired of a witness as to defendant's involvement in a related treble damage suit. The District Court directed the jury to disregard the question and answer. The Court of Appeals held that this was sufficient to avoid the prejudice.

CONCLUSION

For all the reasons herein given, and the reasons stated in the Petitioners' Petition, the Committee urges this Court to review the Sixth Circuit's judgment and opinion in this case.

Respectfully submitted,

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